



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/42007/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11 February 2016

Decision & Reasons Promulgated
On 17 March 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE H J E LATTER

Between

KHURRAM SHAHZAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Garrod, counsel.

For the Respondent: Mr C Avery, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of the First-tier Tribunal (Judge CAS O'Garro) dismissing his appeal against the respondent's decision dated 15 October 2014 refusing him further leave to remain as a Tier 1 (Entrepreneur).

Background

2. The background to this appeal can be summarised as follows. The appellant is a citizen of Pakistan born on 9 January 1986. On 3 March 2010 he was granted leave to enter the UK as a Tier 4 student until 30 April 2011. He was then granted further leave to remain as a Tier 4 student until 18 November 2012 and on 20 August 2012

further leave as a Tier 1 (Post-study) migrant until 20 August 2014 when he applied for further leave as a Tier 1 (Entrepreneur).

3. His application was refused on 15 October 2014. The respondent was not satisfied that he could meet the requirements of Appendix A: Attributes relating to access to funds. He had stated that he had access to at least £50,000 held in the name of his business to invest in the UK. However, it was the respondent's view that the evidence supplied (a Barclays bank statement in the name of the business, a director's loan agreement and a third-party declaration from his team member) did not meet the criteria specified under Appendix A because he had not provided any accounts as evidence of investment and had not provided suitable third party declarations as evidence that he had access to his team member's funds. The decision then says:

"The Secretary of State is not satisfied, therefore, that you qualify for the award of points in this area. Acceptable evidence as defined in paragraph [s] 41-SD [and 46-SD] of Appendix A of the Immigration Rules must be provided in order for you to meet the criteria and be awarded points.

As a result of the above, you have not demonstrated that you meet the requirements of the rules to be awarded points under provision (d) in the first row of Table 4 of Appendix A."

The Findings of the First-tier Tribunal Judge

4. The appellant appealed against this decision. At the hearing the judge recorded that she had extracted the relevant parts of appendix A of the amended Immigration Rules for the period 1 August 2014 to 20 October 2014 which are set out at [16] of her determination. The appellant did not give oral evidence but relied on a statement filed in respect of the appeal saying that he had joined up with Mr Bilal Ahmed and they had agreed to set up a new business together. They were entrepreneur team members and on 21 November 2013 he and Mr Ahmed had registered their company, Impetus Business Services Limited. They were both directors of the company. The appellant had invested £26,500 towards the business and Mr Ahmed £25,000. This sum of money had been deposited into the business account as a director's loan.
5. The judge commented that the Tier 1 Entrepreneur guidance applicable when the appellant made his application stated that from 11 July 2014, an applicant who applied for leave to remain and has or was last granted leave to enter or remain as a Tier 1 (Post-study work) migrant would only be awarded points under the provisions in (b)(ii) or (b) (iii) in Table 4 of Appendix A, unless they could take advantage of the transitional arrangements under the conditions of provision (d) [22]. Under those arrangements, an applicant must have previously held leave as a Tier 1 (Post-study work) migrant since and before 11 July 2014 and up to the date of his application, had been continuously engaged in business activity as a registered self-employed or director and have already invested £50,000 in the UK business. As the appellant had applied under the transitional arrangements that must mean that he has already invested in a business, which has been active before 11 July 2014 [23]. He had

submitted documents, which showed that he was the director of a company registered on 21 November 2013 but he was unable to demonstrate the investment he made into that company before 11 July 2014 to enable him to get the points he required [29].

6. The judge went on to find that the provisions of para 245AA did not assist the appellant and that the respondent's decision was proportionate to a legitimate aim within article 8 (2). The appeal was accordingly dismissed.

The Grounds of Appeal and Submissions

7. In the grounds of appeal it is argued that the application should have been assessed only under the provisions of para 41-SD which applied to those who had access to the required sum whereas para 46-SD applied to applicants who had invested either fully or in part that required sum. In his application form the appellant had ticked the box which said that none of the funds were invested. It had been argued that the respondent had erroneously applied the requirements in para 46-SD and that this issue had not been considered in the decision. Had the respondent applied para 41-SD, the application would have been allowed.
8. Permission to appeal was refused by the First-tier Tribunal but allowed by the Upper Tribunal on the basis that it was arguable that the judge had conflated access to and investment in not less than £50,000 and the respective requirements. UTJ McWilliam added that it was expected that both parties attend a hearing with a copy of the relevant rules or guidance and any relevant transitional provisions.
9. At a hearing before me Mr Garrod produced the Tier 1 Entrepreneur Policy Guidance to be used for applications made on or after 1 August 2014. He submitted that there was no requirement for £50,000 to be invested and that the judge had erred by finding that there was such an additional requirement. The documents submitted by the appellant had met the requirements of the rules and, so he argued, the application and appeal should have been allowed.
10. Mr Avery accepted that he could not explain how para 46-SD came into play in relation to the appellant's application. On a plain reading of the rules it was his view the judge was probably wrong in her approach and that it was not immediately clear why evidence of investment should be required.

Assessment of Whether there is an Error of Law

11. The issue for me at this stage of the hearing is whether the judge erred in law such that her decision should be set aside. In substance the outcome of the appellant's appeal depends on whether in addition to showing that he had access to £50,000, he was required to provide evidence in respect of an investment of £50,000 in relation to his previous leave as a Tier 1 (Post-study work) migrant. The judge referred to transitional arrangements but neither Mr Avery nor Mr Garrod was able to provide

any further information about them save in so far as appeared from the Policy Guidance produced.

12. There clearly were transitional arrangements as they are referred to in the appellant's application form. These appear at section 3A. So far as Tier 1 (Post-study work) migrants are concerned, if they are applying to switch to the entrepreneur route after 11 July 2014 they are required to have £50,000 from a listed seed funding competition or one or more UK/devolved government departments unless there are able to meet the transitional arrangements in the 11 July 2014 section of the Policy Guidance. On the application form this is set out as follows:

"Tier 1 (Post-Study Work) Transitional arrangement-11 July 2014-access to not less than £50,000 and previously held leave as a Tier 1 (Post-Study Work) migrant, and since before 11 July 2014 and after the date of your application you have been continuously engaged in business activity, either as registered self-employed or director, in an occupation at degree level (group d)."

13. This is the box ticked by the appellant. In response to the question at G5, "Have you already invested all or part of the funds in a UK business that you have joined or started, within the 12 months ... before the date of this application?", the appellant ticked the box, "No, none of the funds". It is argued with some force that if an applicant seeking to switch from Tier 1 Post-study migrant to an entrepreneur was required to show an investment, this question would never be applicable.
14. The additional arrangements relating to Tier 1 (Post-study work) migrants are set out at paragraphs 23 and 58 of the Policy Guidance. This reflects the summary given on the application form that if an application is made by someone in the UK with permission to stay as a Tier 1 Post-study work migrant after 11 July 2014, they are allowed to make the initial application in the UK only if they have specific types of funding or if they qualify under the transitional arrangement where the requirement is for access to £50,000 or more from another source (i.e. not from UK entrepreneurial seed funding competitions or UK/devolved government departments) including their own funds or money from third parties, which may include venture capital firms regulated by the FCA and continuous engagement in business in the UK since before 11 July 2014: paragraph 23. The position is set out further in paragraphs 58 and 59 where it is again made clear that an application must relate to the specific types of funding unless an applicant can show that he has been engaged in business activity since before 11 July 2014 at the specified level. If these conditions are met the applicant must have at least £50,000 to invest in UK business.
15. In the light of the documents produced before me I am satisfied that the judge erred in law by requiring investment in addition to the requirement of having access to not less than £50,000. As the error is clearly material to the outcome of the appeal, the decision is set aside.

Re-making the Decision

16. The proper course is for me to re-make the decision. As is apparent from the consideration of whether the judge erred in law, the sole issue in this appeal was whether in addition to meeting the requirements set out in Table 4 of the Rules, the appellant had to show that he had previously invested £50,000 in a business. For the reasons I have given I am not satisfied that this was a requirement of the transitional arrangements. I am satisfied that the appellant met the requirements of the Rules and that the evidence he produced met the requirements of the specified evidence to be produced in support of the application.

Decision

17. The First-tier Tribunal erred in law and the decision is set aside. I allow the appellant's appeal against the decision refusing him further leave to remain as a Tier 1 (Entrepreneur).

Signed HJ E Latter

H J E Latter
Deputy Upper Tribunal Judge

Date: 29 February 2016